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Supreme Court, U. S.
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

EDWARD H. HUGHES,
RESPONDENT.

Petition for Writ of Certiorari.

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A.H. SMITH,
Assistant Attorney General,
Chief Criminal Appellate Division,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether a court order requiring a defendant to produce a registered weapon for the purpose of a ballistics examination violates the Fifth Amendment privilege against self-incrimination?

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[1] The Commonwealth and the respondent are the sole parties to the instant action.

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EDWARD H. HUGHES,[1]
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Petition for Writ of Certiorari.

Question Presented.

Whether a court order requiring a defendant to produce a registered weapon for the purpose of a ballistics examination violates the Fifth Amendment privilege against self-incrimination?

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[1] The Commonwealth and the respondent are the sole parties to the instant action.

Opinion Below.

The Opinion of the Supreme Judicial Court, *Commonwealth* v. *Hughes* is reported at Mass. Adv. Sh. (1980) 1161, 404 N.E.2d 1239.

Jurisdiction.

The judgment of the court below was entered on May 5, 1980. An application for an extension of time to and including August 3, 1980 in which to petition for a Writ of Certiorari was allowed on June 19, 1980 (Brennan, J.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Invoked.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT.

"Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case.

On October 4, 1978, the respondent was indicted on two counts of assault by means of a dangerous weapon, to wit, a pistol. The police recovered a .38 caliber spent projectile from the vehicle in which the two victims of the assault were riding. On March 28, 1979, the Commonwealth filed a Motion to Order Defendant to Produce Weapon, specifically to produce a Smith and Wesson .38 caliber revolver Serial Number J354354 for ballistics examination. In support thereof the Commonwealth filed an affidavit stating that it had been informed by the Firearms Identification Division of the Massachusetts Department of Public Safety that the defendant had registered to him one .38 caliber revolver. In allowing the motion the court noted,

> Commonwealth to furnish Defendant with report of any ballistic tests within 10 days of its receipt. This motion is ordered sealed. Any question concerning the admissibility of evidence emanating from the allowance of this motion is deferred to the trial justice, if appropriately raised. Defendant's exception noted.

The respondent failed to comply and on August 30, 1979, after hearing, he was held in contempt and ordered incarcer-

ated until purging himself of such contempt. The trial court made Findings, Rulings and Order including the following:

> 3. I further find that the defendant purchased a revolver bearing the same description as that which he was ordered to produce on March 23, 1976, and I further find that no report was made to the Department of Public Safety Firearms Bureau subsequent to that date of purchase of any sale, loss, transfer or other event concerning the ownership of said firearm.[2]

Incarceration was stayed pending appeal.

On May 5, 1980, the Supreme Judicial Court held that the order directing the respondent to produce and the subsequent order adjudging him in contempt, were in error and were vacated. The Joint Application for Direct Appellate Review had presented the issue as follows: "Does the Order of the lower court violate the Defendant's privilege against self-incrimination?" In the Statement of Reasons for Direct Appellate Review the parties stated "The sole issue of law on this appeal concerns the Constitution of the United States."

In posing the issue the Supreme Judicial Court stated:

> The upshot is that we have to say here whether the defendants producing the revolver would have sufficient testimonial aspects to initiate Fifth Amendment consideration and whether in those aspects there can be found a tendency to incriminate him. *Commonwealth* v. *Hughes*, Mass. Adv. Sh. (1980) at 1166 (App. A, p. 16).

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[2] Mass. Gen. Laws c. 140, § 129C requires such a report of all transfers, sales, losses and thefts of firearms (App. B, p. 24).

The court concluded

> The conclusion we reach in this case follows from basic policies supporting the constitutional guaranty. As was said in *Couch* v. *United States*, 409 U.S. 322, 328 (1973), "[i]t is extortion of information from the accused himself that offends our sense of justice." And again: "our sense of fair play . . . dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Our result, were it not dictated, as we think it is, by the Fifth Amendment, would in our view be required by the rather clearer terms of the Constitution of the Commonwealth (see note 3). See especially *Emery's Case*, 107 Mass. 172, 182 (1871).[3] *Commonwealth* v. *Hughes*, Mass. Adv. Sh. (1980) at 1173 (App. A. p. 23).

See also *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967).

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[3] The reference to the Commonwealth's Constitution does not establish an independent state ground for the decision. The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973).

Reasons for the Allowance of the Writ.

I. The Supreme Judicial Court has Decided an Important Question of Federal Law in a Manner Inconsistent With Prior Applicable Decisions of this Court.

A. *The Court Below has Improperly Extended the Fifth Amendment Privilege Against Compelled Testimonial Evidence to Compulsion of Real, Non-Testimonial Evidence.*

This Court has consistently held that the protection of the privilege against self-incrimination does not extend to the compelled production of non-testimonal evidence. The privilege does not extend to the giving of blood samples, *Schmerber* v. *California*, 384 U.S. 757, 763-764 (1966); to the creation of handwriting exemplars, *United States* v. *Euge*, ____ U.S. ____, 100 S. Ct. 874 (1980) (decided Feb. 20, 1980). *Gilbert* v. *California*, 388 U.S. 263 (1967); voice exemplars, *United States* v. *Dionisio*, 410 U.S. 1 (1973); or to compelling a defendant to don a blouse worn by the perpetrator, *Holt* v. *United States*, 218 U.S. 245 (1910).

The court below rejects the authority of these cases apparently on the ground that the act of producing the weapon constitutes tacit admission of the existence and location of the weapon and impliedly serves to authenticate the weapon. In so doing, the court has applied the analysis developed by this Court in *Fisher* v. *United States*, 425 U.S. 391 (1976). It is suggested that certiorari should be granted to resolve two important questions raised by such application.

First, whether the analysis appropriate to the compulsion of documents containing matter of a communicative nature is appropriate to the compulsion of real evidence, in itself, neither testimonial nor communicative. At least one federal

court of appeal, in conflict with the court below, has rejected such application. *United States* v. *Palmer*, 536 F.2d 1278 (9th Cir. 1976). Although Mr. Justice Marshall, concurring in *Fisher*, noted in a footnote that the court's theory "would appear to apply to real evidence as well" (*Fisher*, at 430 n.1) the issue was not before the court, and, it is suggested, is a question of great importance to law enforcement deserving of resolution, particularly in light of the substantial conflict such analysis raises with the *Schmerber* line of cases.

Second, the *Fisher* analysis, concerning itself with the implicit communicative aspects of the act of production of a document is inappropriate to the production of real evidence.

The basic concern in *Fisher*, whether the act of production might serve to authenticate the document in question and its contents, has no application to the instant case. Here the defendant has been compelled to produce the weapon for a ballistics examination. Authentication of the weapon is accomplished, not by the defendant's production, but by the fact that it bears the serial number contained in the registration. There is no compulsion that the defendant himself supply such information. The evidence developed through the ballistics analysis will be produced through expert testimony exactly as in *Schmerber*.

The court below distinquished *Schmerber* by determining that the location of the blood was a foregone conclusion, while here the location of the gun is not. It is suggested that this is not the controlling criterion for application of the privilege.

First, the prosecution has evidence, at least inferentially through the registration of the weapon and absence of any notice of loss, sale or transfer, that the weapon is in the possession of the defendant. Production of the weapon could only constitute testimonial evidence of its location if indeed the prosecution sought at trial to offer testimony that the gun was produced by the defendant. However, the order in the instant

case specifically deferred any ruling on the admissibility of such testimony and it is suggested the issue was not properly before the court below.

Most importantly, contrary to the cases relied upon by the court below, the act of producing itself, or the implicit acknowledgement of possession of the gun, is not in itself incriminating. It is not illegal to possess a registered gun. *Compare, United States* v. *Campos-Serrano,* 430 F.2d 173 (7th Cir. 1970) (possession of altered alien registration, a criminal offense itself); *State* v. *Dennis,* 16 Wash. App. 417, 558 P.2d 297 (1976) (possession of illegal drugs); *State* v. *Alexander,* ____ Minn. ____, 281 N.W.2d 349 (1979) (decided May 18, 1979) (possession of an obscene film).

The weapon would constitute incriminating, although nontestimonial evidence only if the ballistics examination indicates or establishes that it was the weapon that fired the shell found in the victim's automobile. This testimony would require no communication from the defendant. Therefore, the Commonwealth submits that the decision of the court below conflicts with this court's decisions dealing with the extention of the Fifth Amendment privilege to the compulsion of real evidence as evidenced in *Schmerber* and its progeny and the decisions of certain of the circuit court's of appeal. See *United States* v. *Authement,* 607 F.2d 1129 (5th Cir. 1979) (compelled production of brass knuckles); *United States* v. *Bridges,* 499 F.2d 179 (7th Cir. 1974) (hand swabbing for chemical analysis).

Moreover, even if the *Fisher* analysis is applicable to the compulsion of real evidence, here the three elements which must be shown to simultaneously exist before the Fifth Amendment is violated do not exist. True, there is compulsion, but it is not of a testimonial communication that is incriminating. The testimonial and possibly incriminating evi-

dence will emanate from the ballistics examination and not from any communication or act of the defendant.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A.H. SMITH,
Assistant Attorney General,
Chief Criminal Appellate Division,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

COMMONWEALTH *vs.* EDWARD H. HUGHES.

Berkshire. February 5, 1980. — May 5, 1980.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, LIACOS, JJ.

Constitutional Law, Search and seizure, Self-incrimination. *Firearms. Evidence*, Firearm. *Practice, Criminal*, Discovery.

INDICTMENT found and returned in the Superior Court on October 4, 1978.

A proceeding for contempt, commenced on August 21, 1979, was heard by *Simons*, J.

The Supreme Judicial Court granted requests for direct appellate review.

Leonard H. Cohen (*David O. Burbank* with him) for the defendant.

Daniel A. Ford, Assistant District Attorney (*Anthony J. Ruberto, Jr.* District Attorney, with him) for the Commonwealth.

KAPLAN, J. A Berkshire County grand jury on October 4, 1978, indicted the defendant Edward H. Hughes on two counts of assault by means of a dangerous weapon, to wit, a pistol (G. L. c. 265, § 15B). The charges arose from an incident in Otis, Massachusetts, on June 21, 1978, when the defendant allegedly assaulted John Joyner and Leonard Terranova by firing two rounds through the front windshield of a truck in which the men were sitting.[1] Inspection of a recovered bullet suggested that it came from either a .38 caliber or .357 magnum handgun. On June 22, 1978, the

[1] These circumstances appear from an affidavit supporting an application for a search warrant which is added to the appellate record by consent of the parties.

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Otis chief of police asked the defendant whether he owned either kind of gun and, if so, whether he would surrender it voluntarily for examination. The defendant produced a .357 magnum pistol. Tests showed it had not been recently fired. The defendant refused consent to a search of his car, which was impounded at the time, for any additional weapon. However, the police on June 22 obtained a warrant for search of the car for "[e]ither a 38 calibre or 357 Magnum pistol and spent shells from either." Police executed the warrant that day and made the return: "Nothing pertaining to warrant found."

The defendant pleaded not guilty on October 10, 1978, and was released on personal recognizance. Customary defense motions followed. On March 28, 1979, the Commonwealth filed a "Motion to Order Defendant to Produce Weapon" for ballistics examination. The weapon was described in the motion as a "Smith and Wesson .38 Caliber Revolver Serial Number J354354." An accompanying affidavit stated that the defendant had registered the revolver with the firearms identification division of the Department of Public Safety. This was apparently under G. L. c. 140, § 128B; and we note that pursuant to § 129C such a registrant must report to the division any sale, gift, or other transfer of possession of the weapon; failure to do so is criminally punishable (G. L. c. 269, § 10 [*h*]). The motion was allowed after hearing: the defendant was ordered to produce the described revolver within ten days; the Commonwealth was ordered to give the defendant a copy of any ballistics test results within ten days of receiving them; and "[a]ny question concerning the admissibility of evidence emanating from the allowance of this motion is deferred to the trial justice, if appropriately raised."

The defendant attempted to secure immediate review of the order by applying to a single justice of this court to exercise our supervisory power, G. L. c. 211, §§ 3 and 4A, claiming that the judge's order, if enforced, would violate his constitutional privilege against self-incrimination.[2] The

[2]The Commonwealth has not argued that the defendant's voluntary surrender of one gun waived any Fifth Amendment rights he might have

single justice denied the application on July 6, 1979, observing that regular review could be had on an appeal from an adjudication of contempt for failure to comply with the order, or, if the indictments went to trial, then on appeal from a judgment of conviction, with error claimed in the trial judge's refusal to exclude the gun "and all evidence derived from the production thereof."

On July 27, 1979, the Commonwealth demanded by registered letter that the defendant turn over the gun within twenty-four hours or face contempt charges. On the defendant's failure to reply, the Commonwealth on August 21, 1979, instituted proceedings for contempt which were brought to hearing on August 30. A representative of the firearms identification division testified that on March 23, 1976 (twenty-seven months before the alleged assault) the defendant had registered the gun described, and had not since then filed any report of transfer of the gun. In his findings, ruling, and order of August 30, 1979, the judge found that the defendant had purchased the revolver on March 23, 1976, and had not filed any further report. The defendant was held in contempt but given until 3 P.M. that day to produce the weapon or show present inability to do so, otherwise he would be incarcerated until purgation or further order of the court. Sentence being stayed by the judge, the parties applied jointly for direct appellate review, which we allowed. We reverse.

1. *The Fourth Amendment question.* The defendant's contention, as expressed in the court below and in the joint application to this court, rested on the Fifth Amendment.

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to refuse surrender of another. Cf. *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). See generally Note, Testimonial Waiver of the Privilege Against Self-Incrimination, 92 Harv. L. Rev. 1752 (1979). Nor is it argued that the defendant's alleged possession of the gun is other than personal. Cf. *Bellis* v. *United States*, 417 U.S. 85 (1974) (no Fifth Amendment privilege available to person holding records of dissolved three-person partnership); *United States* v. *White*, 322 U.S. 694 (1944) (same for assistant supervisor subpoenaed by grand jury to produce union records); *Dreier* v. *United States*, 221 U.S. 394 (1911) (same for subpoena issued to officer of corporation demanding production of corporate records in his custody).

But he now ventures to say in a footnote in his brief that the order "may . . . have . . . violated" his right under the Fourth Amendment[3] to be free of unreasonable searches and seizures, for it sought, he suggests, "to probe the Defendant's *mind*" which is "per se unreasonable." (Defendant's emphasis.) There are no supporting citations. We deal with the Fourth Amendment only to indicate that it may be put to one side in the present case.

A person may complain of a search warrant, and thus of the seizure of material obtained by the search, on the ground that the warrant was issued without probable cause or was indefinite, obscure, or overly broad in its description of the things to be taken or the place to be searched. A warrant defective in any such respect would lead to a search or seizure unreasonable in the sense of entailing an undue invasion of personal privacy by government agents. This is the familiar terrain of the Fourth Amendment. Of course, if objections of this order fail, material may be brought in and used that may be, and usually is, of an incriminating character, but the person involved has not been required to assist in the production.

In the present case of a motion addressed to a person to produce a physical object (similar to a subpoena duces tecum) the objection is not that there is lack of cause for seeking the production — i.e., that the investigatory effort is illegal — or that the object sought is irrelevant to the inquiry or is insufficiently described.[4] Rather the objection is, precisely, that the defendant's assistance is demanded —

[3] Of course these Amendments bear on the States through the Fourteenth Amendment. See *Malloy* v. *Hogan*, 378 U.S. 1 (1964) (Fifth Amendment); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule). Also involved are the corresponding provisions of the Constitution of the Commonwealth, art. 12 of the Declaration of Rights. As to self-incrimination: "No subject shall . . . be compelled to accuse, or furnish evidence against himself."

[4] A claim of indefiniteness or the like would invoke protections deriving from the Fourth Amendment. See *Fisher* v. *United States*, 425 U.S. 391, 401 (1976); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946).

assistance in a testimonial sense. That is what the defendant means by "mind probe." He is required under the order himself to produce the gun and thereby, he argues, make a series of important avowals with an incriminating tendency (discussed particularly in our point 2 below), or to explain his inability to comply. So the grievance, if there is one, fits under the Fifth Amendment, not the Fourth.

There are situations of subtle interaction between the Fourth and Fifth Amendments, for example, where the very object sought is a "speaking" object, say a statement, voluntarily written, which tends by its internal content to incriminate the writer, who is the person ordered to produce the writing. See generally *Couch* v. *United States*, 409 U.S. 322, 338-339 (1973) (Douglas, J., dissenting); Note, Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis, 69 Nw. U. L. Rev. 626 (1974). A consideration of the exact bearing of the two Amendments on such problems would involve us in an analysis of difficult authority from *Boyd* v. *United States*, 116 U.S. 616 (1886), through *Andresen* v. *Maryland*, 427 U.S. 463 (1976).[5] We are confronted with no such problem here.

2. *Fifth Amendment analysis.* So the defendant must justify what would otherwise be contumacy by reference to his privilege not to be "compelled . . . to be a witness against himself" (or the counterpart State constitutional provision). But in the present case we do not have the prototypical compelled oral testimony. Under compulsion of the order the defendant could produce the weapon without uttering a word.

In one sense the distinction between the two forms of production — a statement in audible prose and an implicit statement — appears to be of no consequence because the protec-

[5]For a summary of the case law and suggested interpretations, see Note, Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945 (1977); Note, The Life and Times of *Boyd* v. *United States* (1886-1976), 76 Mich. L. Rev. 184 (1977); Ritchie, Compulsion that Violates the Fifth Amendment: The Burger Court's Definition, 61 Minn. L. Rev. 383 (1977).

tion of the privilege extends to "an accused's communications, whatever form they might take." *Schmerber* v. *California*, 384 U.S. 757, 763-764 (1966). See *United States* v. *White*, 322 U.S. 694, 699 (1944); McCormick, Evidence § 126 at 268 n.73 (2d ed. 1972). In another sense the distinction may be crucial since "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher* v. *United States*, 425 U.S. 391, 408 (1976) (emphasis in original). See *United States* v. *Wade*, 388 U.S. 218, 222 (1967).

The upshot is that we have to say here whether the defendant's producing the revolver would have sufficient testimonial aspects to initiate Fifth Amendment consideration and whether in those aspects there can be found a tendency to incriminate him. "These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." *Fisher* v. *United States*, *supra* at 410. But for guidance we look primarily to *Schmerber* and *Fisher*.

In *Schmerber* the Supreme Court upheld against constitutional attack the use as evidence, in a prosecution for drunken driving, of laboratory analysis of a blood sample taken from the defendant against his will. Although the submission to the physical act was involuntary, and the test results incriminating, there was, according to the Court, "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused." 384 U.S. at 765. Rather the defendant was merely "the source of 'real or physical evidence'"; "his participation, except as a donor, was irrelevant to the results of the test." *Id.* at 764-765.

Later cases applied the *Schmerber* reasoning to uphold the forcing of voice exemplars (*United States* v. *Wade*, 388 U.S. 218 [1967]), handwriting samples (*Gilbert* v. *California*, 388 U.S. 263 [1967]), fingerprints (*Snow* v. *Oklahoma*, 489 F.2d 278 [10th Cir. 1973]), and other things. These

cases conceived that in each instance the accused was used as an object on which various tests were performed; he was not required "to disclose any knowledge he might have." *United States* v. *Wade, supra* at 222. See 8 J. Wigmore, Evidence § 2264 (McNaughton rev. 1961). Cf. *United States* v. *Mara*, 410 U.S. 19, 37 (1973) (Marshall, J., dissenting).

Fisher took up the *Schmerber* analysis to see where it led in a case of production of documents compelled from one other than the writer.[6] The I.R.S., after interviewing certain taxpayers regarding possible civil or criminal infractions of the tax laws, learned that these persons had retrieved some of their accountants' work papers (which laid out analyses of the taxpayers' income and disbursements related to the years under investigation), and had passed the papers to their attorneys. Summons was then served on the attorneys to produce the work sheets. The issue reduced to whether the taxpayers themselves had a Fifth Amendment privilege to refuse production of the papers.[7] On the particular facts, the Court held against the taxpayers.

The Court recognized that two kinds of testimonial assertions were implied in the production. First, "producing the documents tacitly admits their existence and their location in the hands of their possessor." *Fisher*, 425 U.S. at 411-412. Second, the production implicitly authenticated the papers as being those requested in the summons. *Id.* See *People* v. *Defore*, 242 N.Y. 13, 27 (1926) (Cardozo, J.). Why, then, was the claim of privilege denied? The elements of existence, location, and control of the papers were "not in is-

[6]Hence the "speaking document" problem earlier mentioned did not arise. See *Fisher* v. *United States, supra* at 409, 414.

[7]The Court first stated that the attorney could not assert the client's (taxpayer's) Fifth Amendment privilege; but as the client had passed the documents to the attorney in a privileged transaction, it was disposed to analyze the case as if the client had never made the transfer. See *Fisher* v. *United States, supra* at 396-405. (The Court analyzed two cases presenting essentially identical facts, one from the Third Circuit, the other from the Fifth Circuit.)

sue"; "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." 425 U.S. at 411. The information added was trivial. In the circumstances, existence and location of the papers were comparable to the existence and location of the blood extracted in *Schmerber*. Coming to the element of authentication, the Court said that, while testimonial, it did not incriminate the taxpayer: the implicit assertion that the papers produced conformed to the summons would not serve to authenticate them at trial; it was the testimony of the accountants that would do that. Nor was the government using the taxpayer's "authentication" to prove that the figures were accurate. *Id.* at 413.

The converse inference from *Fisher*, as indicated by the Court,[8] is that assertions implied from production of things (whether or not documents) are within the Fifth Amendment, and thus justify the refusal to produce, when they are nontrivial and incriminating. Remitting to a footnote cases that do not directly test this inference — cases like *Fisher* on their facts, and so requiring the production[9] — we cite recent decisions which verify the inference and illustrate it. As for the implicit admission of existence, location, or control, even before *Fisher* the Seventh Circuit in *United States* v. *Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970), reversed a conviction for knowing possession of a forged alien registration receipt card where the defendant had been coerced into producing it during a custodial interrogation: "An individual should not be compelled to produce the crime itself." *Id.* at 176. In *State* v. *Dennis*, 16 Wash. App. 417 (1976),

[8] "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the paper produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." *Fisher* v. *United States*, *supra* at 410.

[9] See, e.g., *United States* v. *Osborn*, 561 F.2d 1334 (9th Cir. 1977); *United States* v. *Friedman*, 593 F.2d 109 (9th Cir. 1979).

decided after *Fisher*, the court reversed a conviction of possession of cocaine where a policeman had harassed the defendant into producing bags of the drug from his refrigerator, thus virtually admitting control. *Id.* at 423. In both *Campos-Serrano* and *Dennis* the testimonial propositions were not "foregone conclusions" although the investigating officers had some reason to think they were true; and the element of incrimination was present.[10] Similarly in *In re Grand Jury Subpoena Duces Tecum*, 466 F. Supp. 325 (S.D.N.Y. 1979), the government, having ground to suspect that the accused had made illegal payments to some union officials, tried to have the accused condemn himself by answering to a subpoena for records of his financial transactions with these people. The subpoena was ordered quashed. And in *State* v. *Alexander*, 281 N.W.2d 349, 352 (Minn. 1979), the court reversed a contempt adjudication which had been based on the defendant's failure to produce film, supposed to be in his possession, and claimed to be in violation of the obsenity statute. Here production "would, in effect, be an admission of [defendant's] control or possession of the film."

In *In re Bernstein*, 425 F. Supp. 37 (S.D. Fla. 1977), the court spoke in terms of "authentication" through compelled production offensive to the principle drawn from *Fisher*: the accused was being subpoenaed to produce self-incriminating tape recordings. On the same ground, *United States* v. *Plesons*, 560 F.2d 890, 892 (8th Cir. 1977), recognized the Fifth Amendment privilege of a doctor under grand jury investigation to refuse to produce patient records that might assist the government in convicting him of illegally dispensing narcotics (it was finally held, however, that the surrender of the records had been voluntary).

The present case is consonant with those just cited. If the defendant should produce the revolver, he would be making

[10] We would see no distinction of constitutional dimension between production of what might be called the corpus delicti and production of a thing which was a step or two distant but was nevertheless incriminating. Cf. *Murphy* v. *Commonwealth*, 354 Mass. 81, 83-84 (1968).

implicitly a statement about its existence, location, and control to which the Commonwealth says it would allude at trial to show he had possession and control at some point after the alleged crime. The implied statement would also function as an authentication. See *Curcio* v. *United States*, 354 U.S. 118, 125 (1957); 8 J. Wigmore, *supra* at § 2264, p. 380. But see Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 702 (1968) (criticizing implicit authentication rationale). Nor would the statement amount to a "foregone conclusion" conveying merely trivial new knowledge. On the contrary, it would deal with just those matters about which the Commonwealth desires but does not have solid information. A search warrant has proved futile. Apparently the Commonwealth does not know whether the gun exists or, if it does, where it is being kept; it has only some evidence to base a suspicion that the defendant may be able to produce it, if he will. In the language of the cases, the Commonwealth is seeking to be relieved of its ignorance or uncertainty by trying to get itself "informed of knowledge the defendant possesses." *People ex rel. Bowman* v. *Underwood*, 63 Ill. 2d 382, 387 (1976).[11]

[11] Our analysis is consistent with *Williams* v. *Florida*, 399 U.S. 78 (1970), which upheld against Fifth Amendment attack a Florida rule requiring disclosure by the defendant of the identity of alibi witnesses he intends to call (the government then reciprocally discloses the names of its rebuttal witnesses). The Court said: "Nothing in [the] rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice," and that "[a]t most, the rule only compelled petitioner to accelerate the timing of his disclosure." *Id.* at 84-85. We upheld a similar notice-of-alibi rule in *Commonwealth* v. *Edgerly*, 372 Mass. 337 (1977) (reserving the question of permissible sanctions for failure to give notice of alibi defense). Under *Blaisdell* v. *Commonwealth*, 372 Mass. 753 (1977), a defendant claiming lack of criminal responsibility may be compelled to undergo psychiatric examination but this may be required only where on his part he intends to present expert testimony depending in whole or part on voluntary interview between the psychiatrist and himself; a concept of waiver is involved. In the present case the defendant has no plan to introduce the gun at trial in his own defense; there is not a mere acceleration of disclosure, or a question of waiver.

The avowals sought from the defendant are not only significant but must be taken to be incriminating. The revolver is the supposed instrumentality of the crime, and control or possession after the event, taken together with the earlier ownership attested by the registration, would tend to establish possession at the critical time. It is partially on this declared theory that the Commonwealth has pursued the defendant with its motion to produce. The Commonwealth states that once it has the revolver in hand, it will run ballistics tests, and these may lead to expert testimony, of whatever strength, tying the revolver to the actual assault. This is a step beyond the production sought, but the constitutional privilege "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution . . . ." *Maness* v. *Meyers*, 419 U.S. 449, 461 (1975). See *Taylor* v. *Commonwealth*, 369 Mass. 183, 187-188 (1975); *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951). In reviewing the contempt adjudication, it is right to assume, as the defendant does arguendo in his brief, that he has present possession of the registered gun, which makes very real the factor of self-incrimination that is involved.[12] Cf. *Commonwealth* v. *Kreplick*, Mass. (1980).[a]

By way of rebuttal the Commonwealth appears to be making the argument that the defendant may properly be ordered to produce the gun because — so it claims — enough independent evidence already is available against him to prove beyond a reasonable doubt that he had the gun on the date of the alleged offense. The Commonwealth does not simply assert that the evidence to be gained by production is here inconsequential or nonincriminating; rather it says that the evidence is unworthy of Fifth Amendment protection because it merely enhances other persuasive evidence obtained without the defendant's help. The Com-

[12] We also note that if Hughes failed to produce the gun on request, he might be criminally liable under G. L. c. 269, § 10 (*h*).

[a] Mass. Adv. Sh. (1980) 99.

monwealth's argument is indeed curious. It is as if we were asked to rule that a confession could be coerced from an accused as soon as the government announced (or was able to show) that at a future trial it could produce enough independent evidence to get past a motion for a directed verdict of acquittal. This would be to encourage present infringements of the Constitution on the excuse that they might or would be held "harmless" after trial and conviction.

The Commonwealth has not attempted to eliminate, as far as it could, the testimonial aspects of the defendant's producing the gun, by the expedient of undertaking that at trial it would authenticate the gun simply by the serial number (if that number appears), and would make no tender in the court room of the fact that it was the defendant who produced the gun. We go no further than to express doubt whether the case would have been materially altered by an offer of such an undertaking in the court below. Compare *United States* v. *Authement*, 607 F.2d 1129 (5th Cir. 1979) (per curiam), with *In re Grand Jury Subpoena Duces Tecum*, 466 F. Supp. 325, 327 (S.D.N.Y. 1979); Berger, The Unprivileged Status of the Fifth Amendment Privilege, 15 Am. Crim. L. Rev. 191, 219-220, 222 (1978); Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 979, 987-988 (1977). Implicit statements as to existence, location, and control would nevertheless have been compelled and the information would have been delivered over to the Commonwealth. The Commonwealth could use such information, mediately, to secure other incriminating evidence to put before the jury, and it can be assumed that the testimonial statement as to the location of the gun would be used, mediately, to lead to ballistics tests and ballistics evidence and an opinion thereon. There is no resemblance here to *Schmerber* where location was a foregone conclusion. More generally, we express doubt whether a defendant may be compelled to deliver the corpus delicti, which may then be introduced by the government at trial, if only it is understood that the facts as to the source of the thing are withheld from the jury.

The conclusion we reach in this case follows from basic policies supporting the constitutional guaranty. As was said in *Couch* v. *United States*, 409 U.S. 322, 328 (1973), "[i]t is extortion of information from the accused himself that offends our sense of justice." And again: "our sense of fair play . . . dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Our result, were it not dictated, as we think it is, by the Fifth Amendment, would in our view be required by the rather clearer terms of the Constitution of the Commonwealth (see note 3). See especially *Emery's Case*, 107 Mass. 172, 182 (1871).

The order directing the defendant to produce, and the subsequent order adjudging him in contempt, were in error and are vacated.

So ordered.

Appendix B.

§ 129C. Application of section 129B; ownership or possession of firearms or ammunition; transfers; report to commissioner; exemptions; exhibiting license to carry, etc. on demand.

No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B.

No person shall sell, give away, loan or otherwise transfer a rifle or shotgun or ammunition other than (*a*) by operation of law, or (*b*) to an exempt person as hereinafter described, or (*c*) to a licensed dealer, or (*d*) to a person who displays his firearm identification card, or license to carry a pistol or revolver.

A seller shall, within seven days, report all such transfers to the commissioner of public safety according to the provisions set forth in section one hundred and twenty-eight A, and in the case of loss, theft or recovery of any firearm, rifle or shotgun, a similar report shall be made forthwith to both the commissioner and the licensing authority in the city or town where the owner resides.

The provisions of this section shall not apply to the following exempted persons and uses:

(*a*) Any device used exclusively for signalling or distress use and required or recommended by the United States Coast Guard or the Interstate Commerce Commission, or for the firing of stud cartridges, explosive rivets or similar industrial ammunition;

(*b*) Federally licensed firearms manufacturers or wholesale dealers, or persons employed by them or by licensed dealers, or

on their behalf, when possession of firearms, rifles or shotguns is necessary for manufacture, display, storage, transport, installation, inspection or testing;

(*c*) To a person voluntarily surrendering a firearm, rifle or shotgun and ammunition therefor to a licensing authority, the commissioner of his designee if prior written notice has been given by said person to the licensing authority or the commissioner, stating the place and approximate time of said surrender;

(*d*) The regular and ordinary transport of firearms, rifles or shotguns as merchandise by any common carrier;

(*e*) Possession by retail customers for the purpose of firing at duly licensed target concessions at amusement parks, piers and similar locations, provided that the firearms, rifles or shotguns to be so used are firmly chained or affixed to the counter and that the proprietor is in possession of a firearm identification card or license to carry firearms;

(*f*) Possession of rifles and shotguns and ammunition therefor by nonresident hunters with valid nonresident hunting licenses during hunting season;

(*g*) Possession of rifles and shotguns and ammunition therefor by nonresidents while on a firing or shooting range;

(*h*) Possession of rifles and shotguns and ammunition therefor by nonresidents traveling in or through the commonwealth, providing that any rifles or shotguns are unloaded and enclosed in a case;

(*i*) Possession of rifles and shotguns and ammunition therefor by nonresidents while at a firearm showing or display organized by a regularly existing gun collectors' club or association;

(*j*) Any new resident moving into the commonwealth, or any resident of the commonwealth upon being released from active service with any of the armed services of the United States with respect to any firearm, rifle or shotgun and ammu-

nition therefor then in his possession, for sixty days after such release or after the time he moves into the commonwealth;

(*k*) Any person under the age of fifteen with respect to the use of a rifle or shotgun by such person in hunting or target shooting, provided that such use is otherwise permitted by law and is under the immediate supervision of a person holding a firearm identification card or a license to carry firearms, or a duly commissioned officer, noncommissioned officer or enlisted member of the United States Army, Navy, Marine Corps, Air Force or Coast Guard, or the National Guard or military service of the commonwealth or reserve components thereof, while in the performance of his duty;

(*l*) The possession or utilization of any rifle or shotgun during the course of any television, movie, stage or other similar theatrical production, or by a professional photographer or writer for examination purposes in the pursuit of his profession, providing such possession or utilization is under the immediate supervision of a holder of a firearm identification card or a license to carry firearms;

(*m*) The temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling or firing is for a lawful purpose;

(*n*) The transfer of a firearm, rifle or shotgun upon the death of an owner to his heir or legatee shall be subject to the provisions of this section, provided that said heir or legatee shall within one hundred and eighty days of such transfer, obtain a firearm identification card or a license to carry firearms if not otherwise an exempt person who is qualified to receive such or apply to the licensing authority for such further

limited period as may be necessary for the disposition of such firearm, rifle or shotgun;

(*o*) Persons in the military or other service of any state or of the United States, and police officers and other peace officers of any jurisdiction, in the performance of their official duty or when duly authorized to possess them, provided, however, that private or supporting use of such firearms, rifles or shotguns shall be subject to the provisions applicable to non-exempt persons and uses;

(*p*) Possession of rifles and shotguns and ammunition therefor by nonresidents bearing a current license, permit or identification card to possess any firearm, rifle or shotgun in the state in which they reside;

(*q*) Any nonresident from a contiguous state, provided he is eighteen years of age or over when acquiring a rifle or shotgun, or ammunition, provided it is removed from the commonwealth within fourteen days of such acquisition, and provided that he is in compliance with his own state law and has the proper firearms license if required, and provided, further, that in the case of a rifle or shotgun the seller notifies the chief of police where the purchaser resides of the transfer, description and serial number of the rifle or shotgun and the name, address and license number of the purchaser and seller;

(*r*) Possession by a veterans' organization chartered by the Congress of the United States or included in clause (12) of section five of chapter forty and possession by the members of any such organizations when on official parade duty or ceremonial occasions;

(*s*) Possession by federal, state and local historical societies, museums, and institutional collections open to the public, provided such firearms, rifles or shotguns are unloaded, properly housed and secured from unauthorized handling.

Any person, exempted by clauses (*o*), (*p*) and (*q*), purchasing a rifle or shotgun or ammunition therefor shall submit to

the seller such full and clear proof of identification, including shield number, serial number, military or governmental order or authorization, military or other official identification, other state firearms license, or proof of nonresidence, as may be applicable.

Nothing in this section shall permit the sale of rifles or shotguns or ammunition therefor to a minor under the age of eighteen in violation of section one hundred and thirty nor may any firearm be sold to a minor nor to any person who is not licensed to carry firearms under section one hundred and thirty-one unless he presents a valid firearm identification card and a permit to purchase issued under section one hundred and thirty-one A, or presents such permit to purchase and is a properly documented exempt person as hereinbefore described.

Neither the provisions of section one hundred and twenty-nine C nor the possession of a firearm identification card issued under section one hundred and twenty-nine B shall entitle any person to carry a firearm in violation of section ten of chapter two hundred and sixty-nine.

Any person who, while not being within the limits of his own property or residence, or such person whose property or residence is under lawful search, and who is not exempt under this section, shall on demand of a police officer or other law enforcement officer, exhibit his license to carry firearms, or his firearm identification card or receipt for fee paid for such card, or, after January first, nineteen hundred and seventy, exhibit a valid hunting license issued to him which shall bear the number officially inscribed of such license to carry or card if any. Upon failure to do so such person may be required to surrender to such officer said firearm, rifle or shotgun which shall be taken into custody as under the provisions of section one hundred and twenty-nine D, except that such firearm, rifle or shotgun shall be returned forthwith upon presentation within thirty days of said license to carry firearms, firearm

identification card or receipt for fee paid for such card or hunting license as hereinbefore described. Any person subject to the conditions of this paragraph may, even though no firearm, rifle or shotgun was surrendered, be required to produce within thirty days said license to carry firearms, firearm identification card or receipt for fee paid for such card, or said hunting license, failing which the conditions of section one hundred and twenty-nine D will apply. Nothing in this section shall prevent any person from being prosecuted for any violation of this chapter.